No. 80-948

In the Supreme Court of the United States

OCTOBER TERM, 1980

ARMORED TRANSPORT, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner, a corporation, has a constitutional right not to be prosecuted under Section 1 of the Sherman Act unless the charges are contained in a valid indictment returned by a grand jury.

2. If not, whether an allegedly defective indictment may be treated as an information that is adequate to charge petitioner.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-12) is reported at 629 F. 2d 1313. The opinion of the district court (Pet. App. B-1 to B-13) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 7, 1980. The petition for a writ of certiorari was filed on December 6, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On March 9, 1979, in the United States District Court for the Central District of California, a grand jury indicted petitioner and two of its officers for violating Section 1 of the Sherman Act, 15 U.S.C. 1. Petitioner pleaded *nolo contendere* and was fined $200,000.[1]

Under Local Rule 16 in the Central District of California (Pet. App. B-5), grand juries are authorized to serve for court sessions beginning on the first Monday in March and the second Monday in September. Grand juries are customarily called, impanelled, and sworn two to three weeks before the beginning of the court session during which they are scheduled to serve (*ibid.*).

The grand jury that indicted petitioner was impanelled and sworn on August 26, 1977, "for the September, 1977 session of court" (Pet. App. B-5). Pursuant to Local Rule 16, the session began on the second Monday of the month, September 12, 1977, (*id.* at B-2). The grand jury first sat to

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[1]The two officers pleaded guilty to a superseding criminal information charging them with a misdemeanor violation of the Sherman Act. They voluntarily dismissed their appeals in the Ninth Circuit (Pet. App. A-2) and are not seeking review here.

hear evidence on October 17, 1977 (Pet. App. A-2). On the government's motion, the chief judge of the district court twice extended the term of the grand jury. The second extension ended on March 10, 1979, the day after the indictment against petitioner was returned.

2. After sentencing, petitioner asked the district court to vacate the judgment, permit withdrawal of the *nolo contendere* plea, and dismiss the indictment. For the first time, petitioner contended that the indictment had been returned after the expiration of the maximum, 18-month term of service authorized for a federal grand jury by Fed. R. Crim. P. 6(g).

The district court denied post-conviction relief (Pet. App. B-1 to B-13). The court held that, under Local Rule 16, the grand jury did not begin to serve until September 12, 1977, the date on which the court's September 1977 session began, and that therefore the indictment was returned within 18 months of the beginning of the grand jury's service (Pet. App. B-6). The district court further concluded that Local Rule 16 is consistent with Fed. R. Crim. P. 6(g). The court noted that Rule 6 imposes no express limitation whatsoever on "the Court's power to arrange the time for commencement of [grand jury] service" (*ibid.*). Nor did the court find any implicit limitation in the Rule that would bar a district court from providing that a grand jury's service will commence at some time after impanelment and swearing where, as here, such a measure is designed "to allow for an efficient processing of the many grand juror candidates" (Pet. App. B-5 to B-8).

The district court also sustained petitioner's plea and sentence on an alternative ground. The court reasoned that the government could have prosecuted the corporation by information rather than indictment, because a corporation, by its nature, is not subject to imprisonment, and any offense

punishable only by a fine is not an "infamous crime" within the meaning of the Fifth Amendment guarantee of indictment by a grand jury (Pet. App. B-9 to B-10). Assuming *arguendo* that the indictment was returned by a grand jury whose term had expired, the court treated it as an information and held that it was adequate to sustain petitioner's *nolo* plea (*ibid.*).

3. The court of appeals affirmed, but only on the alternative ground adopted by the district court (Pet. App. A-1 to A-12). The court of appeals ruled first that the grand jury's term of service began on August 26, 1977, the date the jury was sworn and impanelled, and that the indictment was therefore invalid because it was not returned until more than 18 months later, in violation of Rule 6(g). In the court's view, Local Rule 16 is inconsistent with Rule 6(g). Although the court recognized that Rule 6(g) does not specify when a grand jury begins its term of service (Pet. App. A-4), it nonetheless concluded that separation of the date of impanelment from the date on which service commences is inconsistent with Rule 6(g)'s goal of national "uniformity in grand jury service" (Pet. App. A-4 to A-5). The court was also "concerned about the logical basis of a rule that permits creation of a grand jury that has no concomitant power to act" (*id.* at A-5). In addition, the court said, Rule 6(g) was intended to sever the prior relationship between grand jury terms and terms of court. To the extent, therefore, that Local Rule 16 requires that grand jury service be tied to the commencement of a term of court, the court of appeals thought the Local Rule contrary to the purpose of Rule 6(g) (Pet. App. A-5).

Although the court of appeals declared the indictment invalid, it agreed with the district court that petitioners had no right to indictment, because the crime charged was not "infamous" within the meaning of the Fifth Amendment.

The court of appeals held that "[t]he only punishment that is directly relevant to classification of a crime as infamous is the potential punishment that the statute imposes on the particular defendant being tried" (Pet. App. A-10). Because the Sherman Act provides that corporate defendants may be punished only by fine, and because a fine is not infamous punishment, the court concluded that the government could have chosen to proceed against petitioner by information rather than indictment (*id.* at A-9).

Treating the indictment as an information, the court held that the invalid indictment did not affect any substantial right of petitioner (Pet. App. A-11). Even if the indictment had been dismissed, the government would have been free to proceed against the corporation by information. Petitioner pleaded *nolo contendere*, and therefore "any advantage created by the grand jury discovery process was not used by the Government against appellant at trial" (*ibid.*). In any event, the court of appeals concluded, even if an information had been filed after the grand jury investigation was complete, the government would have been authorized, under Fed. R. Crim. P. 6(e)(3)(A), to use against petitioner materials and information obtained during the grand jury proceedings (*ibid.*).

ARGUMENT

Further review is not warranted in this peculiar case. In the first place, for the reasons stated by the district court, the indictment was not invalid. Although we do not believe that the interaction of Rule 6(g) and Local Rule 16 is a matter of sufficient importance to merit this Court's attention, we submit that the court of appeals erred in declaring that, under Rule 6(g), the grand jury's term of service must begin on the date of swearing and impanelment, irrespective of the district court's deliberate decision to postpone the commencement of the term until a date two or three weeks

later. In any event, the court of appeals' decision that petitioner has no right to an indictment is correct, does not conflict with any decision of this Court or any other court of appeals, and is unlikely to have any significant practical effect on future proceedings. Moreover, petitioner's contentions should not be cognizable at all on a request for post-conviction relief. Petitioner alleges, at most, mere formal defects in the timing of the grand jury proceedings. This kind of error, at least where discoverable before trial as in this case, should not be reviewed on collateral attack of a duly-entered judgment of conviction.

1. Although the district court's reasoning in this regard was rejected by the court of appeals, the judgment of conviction was properly affirmed because the indictment against petitioner was valid. The grand jury proceeding that resulted in the indictment conformed with Local Rule 16, and that rule does not conflict with Fed. R. Crim. P. 6(g). Rule 6(g) does not specify when grand jury service begins, and a local rule may define that point as long as it is consistent with the purposes of Rule 6(g). See Fed. R. Crim. P. 57(b). The purposes of Rule 6(g) are, first, to prevent a grand jury from coming unduly under the influence of the prosecutor by over-long association and, second, to provide that all federal grand juries have the same amount of time to transact their business. See, *e.g.*, *United States* v. *Fein*, 504 F. 2d 1170, 1178-1179 (2d Cir. 1974); Act of April 17, 1940, ch. 101, 54 Stat. 110; H.R. Rep. No. 1747, 76th Cong., 3d Sess. 1 (1940); S. Rep. No. 1396, 76th Cong., 3d Sess. 1 (1940). Local Rule 16 serves both these aims by restricting to 18 months the time the grand jury actually transacts business. Moreover, as the district court found (Pet. App. B-5), the Local Rule aids judicial administration.

There is no suggestion in this case that the brief delay between swearing of the grand jury and formal commencement of the grand jury's service prejudiced petitioner or

anyone else. There is also no indication that the procedure adopted by Local Rule 16 in fact gives rise to the kind of disparate practice among judicial districts that Rule 6(g) and its statutory predecessor were designed to eliminate (Pet. App. A-4 to A-5, B-6 to B-7). The asserted concerns underlying the court of appeals' opinion are theoretical at best and do not justify invalidation of a local court rule and dismissal of an indictment returned by a grand jury properly sitting under that rule.

2. Even if the indictment were defective, petitioner would not be entitled to relief. Petitioner contends (Pet. 4-14) that all crimes that are classified as felonies are infamous and that, because violation of Section 1 of the Sherman Act is a felony, all prospective defendants, including corporations, have a constitutional right not to be held to answer unless charged by indictment. Although vigorously advanced, this argument is incorrect.

The decisions of this Court establish that the nature of the punishment that may be imposed, not an abstract judgment about the nature of the offense, determines whether a crime is infamous for purposes of the Fifth Amendment. See, *e.g.*, *Mackin* v. *United States*, 117 U.S. 348, 350 (1886). Punishment by fine is not infamous. See, *e.g.*, *Green* v. *United States*, 356 U.S. 165, 183 (1958); C. Wright, *Federal Practice and Procedure* § 121, at 212 (1969).[2] Accordingly, because petitioner is subject only to a fine, it is not constitutionally entitled to an indictment. Nor can the corporation derive such a right from the exposure of its co-conspirators

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[2]The Ninth Circuit, in *United States* v. *Yellow Freight System, Inc.*, Nos. 79-1665, 79-1666 (Oct. 17, 1980), stated that in "extremely rare" instances, such as a congressional declaration of infamy, a crime that doe not carry an infamous punishment might be made infamous by some other factor. See also Pet. App. A-7, A-8, A-9 n.3. Petitioner, however, cannot point to any such extraordinary consideration here (see Pet. 10 & nn. 6, 7).

to the infamous punishment of imprisonment under the Sherman Act (Pet. App. A-10). Here the corporation, unlike the individual defendants, was in no "danger of infamous punishment" (*United States* v. *Moreland*, 258 U.S. 433, 441 (1922); see also *Mackin* v. *United States*, *supra*, 117 U.S. at 351; *Ex parte Wilson*, 114 U.S. 417, 426 (1885)), and therefore it had no right to be indicted.

Petitioner attempts to avoid the logic of this argument by citing decisions holding that natural persons charged with felonies are entitled to indictments (Pet. 6-10). That rule is not involved here and it is not in dispute. Individuals have a right to indictment for felonies because when so charged they face the infamous punishment of imprisonment in a penitentiary. *Parkinson* v. *United States*, 121 U.S. 281 (1887).[3] This rationale provides no support for a corporation's claim to a parallel right, because a corporation cannot be imprisoned.[4]

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[3]Under 18 U.S.C. 4083, persons may be confined in a United States penitentiary if convicted of offenses against the United States punishable by imprisonment for more than one year. And under 18 U.S.C. 1, an offense punishable by imprisonment for more than a year is defined as a felony. Thus, courts have found it convenient to refer generally to felonies as "infamous" crimes, for which indictment is required. See, *e.g.*, *Stirone* v. *United States*, 361 U.S. 212, 215 (1960).

[4]*Baldwin* v. *New York*, 399 U.S. 66 (1970), on which petitioner heavily relies (Pet. 7, 9 n.5), does not concern grand juries at all, but rather the definition of a "petty" offense that constitutionally may be tried without a petit jury.

Petitioner also argues (Pet. 11-14) that the decision below precludes the grand jury from performing its historic function of protecting against hasty or oppressive prosecution. The cases on which petitioner relies (see, *e.g.*, *United States* v. *Dionisio*, 410 U.S. 1, 16, 17 (1973); *Wood* v. *Georgia*, 370 U.S. 375, 390 (1962); *Jones* v. *Robbins*, 8 Gray 329 (Mass. 1857), cited in *Ex parte Bain*, 121 U.S. 1, 12 (1887)), however, do not refer to rights of corporations, but to rights of "individual citizens", "civilians," and "individuals." The purpose of the Indictment Clause is to protect "individual citizens * * * from the trouble, expense, and anxiety of a public trial before a probable cause is

There is no conflict among the circuits on the issue presented. No court has ever held that, for a particular class of criminal charges, a corporation may not be held to answer except by indictment. The slim precedent on the issue accords with the court of appeals' holding. See *United States* v. *Macklin*, 389 F. Supp. 272, 273-274 (E.D.N.Y.), aff'd on other grounds, 523 F. 2d 193 (2d Cir. 1975).

The paucity of precedent, of course, indicates that the issue has not been a significant one. Nor is it likely to become important in the future. Where, as is ordinarily the case, individuals are co-defendants with corporations, the government generally will proceed against all parties by indictment because of the obvious convenience of a single charging document. Similarly, an indictment will generally be used even in those few cases where only a corporation is charged, because grand juries generally investigate antitrust and other corporate crimes and grand juries return indictments as their accusations. For these reasons, petitioner does not present an issue of recurring importance meriting review by this Court.

3. Petitioner also argues (Pet. 14-16) that, even if the government could have proceeded by information initially, as the courts below held, the indictment should not now be treated as an information. But, if the Constitution does not

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established by the presentment and indictment of a grand jury." *Ex parte Bain, supra*, 121 U.S. at 12. The same considerations are simply not pertinent to a corporation, as this Court has recognized in declining to apply the Fifth Amendment's protection against self-incrimination to corporations. See *United States* v. *White*, 322 U.S. 694, 698-699 (1944).

The corporation is, of course, entitled to trial by jury when charged by information with violating the Sherman Act. The "economic ruin" that petitioner predicts (Pet. 5, 14) cannot be generated by the prosecutor's charging decision alone.

give petitioner the right to insist on an indictment, the corporation cannot obtain that right merely because the government chose to proceed by indictment in this case.

Petitioner suffered no prejudice from the procedure followed here. We may assume for the sake of argument that relief might be warranted if the prosecutorial decision to proceed by indictment rather than information had some objective deleterious effect on the disposition of the criminal charges against petitioner. No such negative consequences followed from the indictment in this case, and petitioner should not be permitted to withdraw its plea.[5] Petitioner entered its *nolo contendere* plea only after consulting with competent counsel and assessing the evidence against it. Notwithstanding petitioner's current assertion (Pet. 15), it surely would have reached an identical decision if the government had filed an information, rather than an indictment, based on the same evidence. Similarly, even if

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[5]Petitioner contends that the result below conflicts with *United States* v. *Goldstein*, 502 F. 2d 526 (3d Cir. 1974). But *Goldstein* did not involve treating an indictment as if it had been an information filed in identical form; it involved an attempted amendment of an indictment without resubmission to the grand jury, in circumstances in which the court had reason to believe that the grand jury might not have voted to indict if it had had more complete information before it. Even *Goldstein* apparently held that reversal is only required where prejudice is shown. To be sure, the Third Circuit seemed willing to assume prejudice, in part on the ground that the prosecution may have obtained discovery through use of the grand jury and in part on the ground that a "subtle, though undeniable, stigma" attaches at trial to a defendant charged in an indictment rather than an information. *Id.* at 531. Whatever the merit of the court of appeals' reasoning, there was no such prejudice here. The case did not go to trial. And the possibility that the grand jury may have been used to obtain discovery against petitioner cannot carry much weight, since the government could have proceeded by information immediately upon the filing of the motion at issue here and could have used the grand jury materials at trial. See Fed. R. Crim. P. 6(e)(3)(A); Pet. App. A-11.

the grand jury in fact served for 18 months and 12 days rather than 18 months, that irregularity did not compromise petitioner's position. The 12 days of service that allegedly exceeded the period permitted by Rule 6(g) did not threaten grand jury independence. There is no reason to believe that, if the grand jury had concluded its deliberations 12 days earlier, its charging decision would have been different. Finally, because the case was never tried, no trial jury was ever exposed to the indictment or to the evidence that led the grand jury to return it. The use of an indictment therefore had no adverse effect on petitioner.

4. In any event, affirmance of petitioner's conviction is proper, because the alleged defect in the indictment may not be raised now on collateral attack, in the form of a request to withdraw petitioner's *nolo contendere* plea. The defect, if any, is not jurisdictional. The 18-month limitation on the grand jury's term of service is contained only in Rule 6(g), and that Rule is not an Act of Congress. It was promulgated by this Court and never amended by Congress. See C. Wright, *Federal Practice and Procedure, supra*, at 5-7; Notes of the Advisory Committee on Rule 6. As this Court stated in *United States* v. *Timmreck*, 441 U.S. 780, 783-784 (1979) (concerning a formal violation of Fed. R. Crim. P. 11), "[s]uch a violation is neither constitutional nor jurisdictional: * * * [the Rule] obviously could not amend the Constitution or limit the jurisdiction of the federal courts."

Similarly, Rule 6(g) does not limit the jurisdiction of the district court, and any violation of its 18-month limitation cannot be raised on collateral attack. The alleged defect concerns only the time at which grand jury proceedings began and the time at which the prosecution was instituted. This complaint should have been raised before trial. See Fed. R. Crim. P. 12(b), and the accompanying Notes of the

Advisory Committee. See also *Tollett* v. *Henderson*, 411 U.S. 258, 266-269 (1973) (post-conviction challenge to grand jury selection will not be entertained unless defendant can show incompetence of counsel in failing to raise issue before guilty plea); *Shimon* v. *United States*, 352 F. 2d 449, 451 (D.C. Cir. 1965) (grand jury acting beyond the term prescribed by D.C. Code could return valid indictment); *United States* v. *Mitchell*, 389 F. Supp. 917, 917-920 (D.D.C.), aff'd on other grounds, 559 F. 2d 31 (D.C. Cir. 1976), cert. denied, 431 U.S. 933 (1977) (alleged unlawful extension of grand jury term was at most a defect in institution of proceedings, and did not deprive the court of jurisdiction). Contra, *United States* v. *Macklin*, 523 F. 2d 193 (2d Cir. 1975). Nothing in the record suggests that, at the time the indictment was returned, petitioner could not have discovered when the grand jury was sworn and impanelled and when its term of service began under Local Rule 16. At least under these circumstances, there is no justification for permitting petitioner to withdraw its plea after entry of a judgment of conviction.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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